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## AN EARLY DECISION ON INTERCOLONIAL RIGHTS.

THE report of the case of Governor Bass *v.* The Earl of Bello-mont, Governor of New York, was found by me in preparing the case of the State of New Jersey in its boundary suit against the State of Delaware. As it has not been published elsewhere, its legal and historical interest seems to justify reproducing the bulk of it where it will be more accessible. It is the first discussion in a court of law of the constitutionality of a colonial statute, and Lord Holt, in considering this, applies the principle, "no taxation without representation," which was the basis of our revolution from England. It contains also a general consideration of intercolonial rights.

About the year 1700 a strong movement was on foot in England directed toward doing away with all proprietary governments in America. Such governments existed in East and West Jersey, Pennsylvania, and Maryland. On the other hand, a crown government was in charge of New York and set up pretensions over New Jersey, requiring outward-bound ships from there to touch at New York. This naturally produced a great outcry, with the result that Governor Bass of New Jersey persuaded the Earl of Bello-mont, Governor of New York, to try the claim by a feigned issue at Westminster Hall.

It is curious to see that the wishes of the many distinguished counsel in this case were not realized. The annals of the time show that the real point in controversy was whether New Jersey

had any rightful proprietary government. This question was raised in the case, but not decided. Yet Lord Holt's views, given perhaps *obiter*, that the Duke of York had no power or authority to divide his "particular franchise" of government of the whole tract, had a great moral effect upon the New Jersey Proprietors by convincing them that expediency required a surrender of their government to the Crown. This they accordingly made in the year 1702.

In the leading case of *Martin v. Waddell*,<sup>1</sup> where the charters and grants referred to in Lord Holt's decision are fully set out, Chief Justice Taney came to a conclusion directly opposite to Lord Holt, deciding that proprietary government was rightfully vested in the New Jersey Proprietors by the grants from the Duke of York.

It may also be observed that Lord Holt takes a view of the Crown's rights which the colonists have always most strenuously denied. He holds in effect that although the right of government might be granted by the Crown to proprietors, or to companies, yet it might be resumed by the Crown at will. This course was taken by King James II. in 1687, when Governor Andros was commissioned to be governor of all New England, including also New York and New Jersey, and by William and Mary in 1692, when Governor Fletcher was appointed to rule over New York and Pennsylvania, and although Maryland had been granted to Lord Baltimore as a proprietary province, it was actually ruled for many years by governors under commission from the Crown.

*Chauncey G. Parker.*

NEWARK, N. J.

JEREMIAH BASSE AND JOHN LOFTING PLTS.  
RICHARD EARLE OF BELLAMONT DEFT.<sup>2</sup>

IN BANCO REGIS, MIDDS

10 May 1700.

In an aċċon of Trover and Conversion of a Shipp called the Hester the Deft pleaded not guilty.

By Rule of Court it was to be admitted that the Deft. was Governor of New York with all its Dependancies.

That the seizure and Condemnaċon of the said Shipp & Cargoe were pursuant to an Act of Assembly of New York.

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<sup>1</sup> 16 Pet. (U. S.) 369.

<sup>2</sup> See 12 Mod. 399; Holt K. B. 332. Parts of the report have been omitted.

That immediately upon the seizure of the said Shipp & Cargoe Restitucon thereof was offered the plts upon payment of ye Customs payable by the said Act of Assembly.

And that the said Ship being Condemned was publickly sold by Inch of Candle for 315 L New York money.

Then several Instruments were read viz.

A Grant made to the Duke of York.<sup>1</sup>

The Act of the Assembly<sup>2</sup> of ye 24 Octob. 1692.

The Instructions to the Lord Bellamont.

Proclamacon put forth by ye Lord Bellamont.

LD. CHIEF JUST. HOLT. Now the question is onely whether East Jersey is dependant of New York.

Then the plts Read an Indenture between the Duke of York and the Earle of Perth and others by which the Duke Granted to them New Jersey.<sup>3</sup>

And the Kings Declaracon in 1683<sup>4</sup> Reciting the Grant to ye Duke of York &c the Indenture of the Duke of 1682, whereby he granted the province of East Jersey to the Earle of Perth and others by which his Maty Declared his will and pleasure to be that the Planters and other Inhabitants of East Jersey should yeild Obedience to the Grantees their heirs and Assignes as absolute Proprietors thereof.

Then some witnesses were examined as to the Antiquitys of ye Assemblys of New York and East Jersey and touching the Governors of New York exercising or pretending to exercise A Jurisdiction in East Jersey.

And soe ye plts Councill left the matter till they should heare what Answer was given to it.

LD. CH. JUST. HOLT. Well Mr. Attorney what do you say to it.

*Mr. Attor. Genll.*<sup>5</sup> But however now my Lord we are upon a Qucon of Law how far these Grantees can maintaine this accon upon the notion of their being independant of New York. We think there is no foundation at all for it They have Read the Letters Patents in 1664 by which all this Tract as well East and West Jersey as New York was granted as one intire tract of land and Territory to ye Duke of York his heires and Assignes. In that Grant he hath great Powers and Authorityes Granted to him the Validity of which I shall not dispute at present but take notice of

<sup>1</sup> Mch. 12, 1664.

<sup>2</sup> Of New York.

<sup>3</sup> Dated March 14, 1682-3.

<sup>4</sup> Nov. 23.

<sup>5</sup> Sir Thomas Trevor.

what is Granted there is a Power of Pardoning and appointing Commissrs etc. and Judges and expressly a Power of making Laws for all that tract of land.

Now my Lord here is a Legislative Power granted to the Duke ; Now this extends to the whole tract, to the whole territory as well East Jersey as New York for at that time they were undivided. It does not give him any power to devide the Legislative Authority but if he had kept it in his own hands he must have executed it as one Authority throughout the whole and could not have divided it by erecting several Independant Assemblys and Establishing severall Independant Jurisdicçons. It was never intended when the Crowne granted such an intire tract but that there should be kept one Intire Jurisdicçon for the preservaçon of the whole for when tis Divided one part grows too weake for the other And quarrells arise and every one Considers his owne private interest and the Publick is neglected Soe that tis not agreeable to the Words or intent of this Charter that this which was granted as one Intire Jurisdicçon should be executed seperately and this the rather appeares by the words that Confirme them to make their Laws as neare as might be to the Laws and Statutes of England where there is but one intire Legislative Power.

They claime by a grant from the Duke of York as they are his Assignees of part of this territory granted to him with these Authorities. Say they, wee by this Grant from the Duke have the same Jurisdicçon (they cant prtend no more) as they had from the Crowne soe that my Lord if he himselfe could not have exercised this Jurisdicçon independant in severall parts of this territory then certainly if they had it granted to them expressly it would be voyd Now he hath granted noe such thing the Grant that was read is in 1682 and that Recites a former grant in 1664. I do not see that the grant recited will give them any such authority. For there is not a word in it of any power or authority of governing. Soe that my Lord in 1664 for what appeares there is nothing granted but such a Division of Land for them to plant but still subject to the Authority vested in the Duke of York by Leters Patents. Soe that till the yeare 1682, it does not appeare that they had any Authority for the Administraçon of the Government. Yet I believe they might take upon them such a Power and did call Assemblyes but tis plaine they had no Right to do it by this Grant of 1664 for no body will say that by the Grant of the Land this Royall Authority did pass. It would not pass as incident to

the Land tho' I think one of the Councill said soe but that cannot pass sure by Implicaçon for one man may have the Land and another the Authority espetially Royall Jurisdiçon. If the King grant away any Land that wont pass any Royal Authority nor no Royall Franchise unless it be expressly Granted. Then we come to the grant of 1682.<sup>1</sup> And that will not goe much further. It is plaine when this Jurisdicçon was Granted to the Duke It was not thought that the Legislative Power passed by Implecaçon or Generall words of Government or Authority or Royall Franchise but the same was particularly named the Charter Grants him the Power of Governing and making Laws and afterwards for him to Confirme and alter them soe that it was thought necessary that should be named particulerly Now see how it is mençoned in the Grant from the Duke under wch they Claime thereafter the Lands are Granted and all Bays Rivers and waters &c. It says all Royalties Franchises and Appurtenances whatsoever to ye same belonging or in any wise appteyning. There are all ye words in this Grant from the Duke of York. Now my Lord with Submission this cannot passe the Legislative Power in a Grant. Here is nothing but the Ordinary Power of Government which is the Administration. But my Lord what Wee insist upon that if in Expresse words it had been Granted by ye Duke it could not by Law be granted allowing the King had well granted this Legislative power we say he could not Assigne it over to another he might Assigne the Land and give them ordinary Jurisdicçon which is done by Officers but the Legislative Power is of soe high a nature that tho' it be granted to him and his Assignes 'tis not Assignable.

If the Crowne should direct County Palatines within such a Circuit I don't think the Grantee could make three County Palatines of it though it was Granted to any man and his Assignes he could not divide it into severall Independent Jurisdicçons but he must enjoy it according to his Grant as one Intire Jurisdicçon within such a Circuit of Ground.

My Lord this is a matter of great Consequence to the Crowne for these Plantaçons if Independant on New York will pay no Duty. If they can get a great deale of money in a little time they won't care what becomes of the Plantaçons afterwards and New York will be disabled to preserve the whole. I hope there is no foundaçon in law for it.

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<sup>1</sup> See n. 3, page 485.

*Mr. Soll. Genll.*<sup>1</sup> I will admit at present that the Grant made to the Duke with a Power to Governe by such Laws as he should think fitt and to make Laws to be good as it is a Grant to him his heires and assignes But this Construcçon is ill placed to understand it that they must be the Assignes of the Power who are the Assignes of the Lands that King Charles the 2d Granted it would be hard to think that the word Assignes should carry the Assignment of the Power itselfe. It was a Confidence that the King had in the Duke and his heires but perhaps he might not have had that Confidence in his Assignes. That would be insuperably hard to carry it soe far much more to carry it to the Assignes of this Land Granted to the Duke of York. At that rate not onely these persons that claime under the Earle of Perth and others and the Assignes of other Lands had this Power Exclusive of the Duke and his Assignes but even every particular Planter under them may pretend to have the same Power.

Now my Lord tis true phaps they had Assemblys before that of New York and if they had no Assemblys since this Revoluçon the King might Grant them A Power to make Assemblys but certainly themselves cant set them up, Soe that whatever the Practise hath beene that wont give an Interpretaçon of a Grant made within the time of memory and nothing of practise can Confirme to them a Power that was not Assigned and since that the Governors from the King have exercised Acts of Power under the Commission that hath been granted to them and before that time tho' there have beene no Assemblys wee have Evidence on our side to that purpose both of Governors made by the Duke and his present Maty but I think this Question depends upon matter of Law upon the Grant.

*Mr. Sergt. Darnell.* Yes my Lord wee shall offer some Evidence that I think may be of use in this Case.

LORD CH. JUST. HOLT. I wont hinder you but I would speake as to the Right because Mr. Attorney insisted on matter of Law. Ile tell you what occurs to me in this matter. You say that such an Assembly or Legislative Power cannot be set up by the People of East Jersey how came you to set up a Legislative Authority at New York for it appeares upon the Evidence if that be true that Sr Edmund Andrews Governed by himselfe and a Councill at first and before my Lord Dungans time there was no Assembly at New York and he was the first that Established such Assemblys. Then

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<sup>1</sup> Sir J. Hawles.

if he was the first that Establishd those Assemblys how comes it to pass that they must be for the whole Tract of land in the Dukes Patent.

The next thing is this Supposing as you say it be true that this Authority and Power of Governmt and making of Laws cannot be divided you wont say that New Jersey is Excluded from having a right to send to those Assemblys then if the whole tract if the whole Land and Territory that is granted have an Equall right to be represented at the Generall Assembly how comes it to passe that those who are close at New York have a power over the rest and they are not summoned. Was this Act made for New York and not for the Dependants.

*Mr. Attor. Genll.* My Lord for the Dependants.

LD. CH. JUST HOLT. In the next place how comes this place to be dependt upon New York. They may as well say that New York is dependant on East Jersey there is noe superiority that appears to me.

*Mr. Attor. Genll.* Because it remained in the Duke and he having the Legislative Authority over the whole in effect the Assemblys there were for the whole And the Land Granted away were dependant on the Duke for their Laws.

LD. CH. JUST. But it did not depend upon New York. If he would have reserved it it might have been in his Power but do you think when he granted three quarters of the Territory away that he hath the Government over them in respect of what remaines? No he hath the Governmt as a particular Franchise granted to him.

*Mr. Sergt. Darnell.* With submission they cannot pretend to any Government under the Crowne.

LD. CH. JUST. Perhaps they can't, how came you by it.

*Mr. Sergt. Darnell.* If this was in the Duke of York it is now in the Crowne.

LD. CHIEF JUST. What if it is.

*Mr. Sergt. Darnell.* If it did remaine in the Duke and is now come to the Crowne againe it must be agreed that the King is seized of this Government againe in Right of his Crowne and he exercise it over all this land.

LD. CH. JUSTICE. What do you infer from that.

*Mr. Sergt. Darnell.* Why then here is an Authority from the King to exercise this Power over New York and all its Dependancies within the first Grant.

LD. CH. JUST. How came it to be Dependant.



*Mr. Cowper.* Now my Lord we think the King hath Granted it intirely to my Lord Bellamont and that it is not severed. And that from the Generall words of Governor of New York and its Dependencys and what better way of Explaining them is there then by the practise and these were the words of ye former Patent.

Then Sr Edmund Andrews was called and Sworne.

Who gave an Account that he had A Commission from the Duke of York to be Governor and to receive the Country Granted to the Duke from the Dutch who had possessed themselves of it in the time of warr and were by the Peace to Restore it But when he was sent Governor of New York Carteret was sent Governor by the Proprietors to East Jersey And that upon a Complaint made to him against Mr. Carteret he did by Advise of his Councill Secure him and unite the Government of those Plantaçons to the Government of New York to which the Inhabitants did submit and was afterwards Justified in it.

Then an Entry was read out of the Councill Book of 14 August 1687 Setting forth that the Proprietors of New Jersey had by Petiçon of May 1687 Complained etc and desired the Customes might be received at New Perth.

*Mr. Attor Genll.* We have done my Lord.

*Sr. Thomas Powrrys.* My Lord I will trouble you but a little this is a thing of great concerne to all the Plantaçons And there is no Inconvenience if you take it as we would have on our side for every one knows that their Laws are Controllable here.

As to what Mr. Attorney says It is Capable of an Answer for I take it where Countrys are unplanted and unsettled and no Law in Being if the King Grants it to the Duke with those Powers that are necessary for the Planting of the place I suppose if the Duke Grants over the whole to another I do not think but his Assignee would have the same Power Soe it would have been if the Duke had granted over the whole tract as it was Granted to him why then put the Duke out of the case and suppose a private subject had this Grant and then instead of granting the whole he grants away two thirds with words in this Grant which I am sure must pass the Powers or extinguish them as to him for here he grants a power to exercise all necessary Government whereby the premises might be the more improved and all Authority which by the Letters Patents are Granted to him.

Then if they set up such distinct Governments the Government

here might Controll them. Now this in the nature of the thing hath no Inconvenience here is a Concurrence of all partys the Duke Granted all that he could Grant the King next yeare does approve of that Grant and directs the People that they should observe the Orders of these Grantees which is a Concurrence of the King to this Grant and hath been followed ever since by the usage Now where is the Inconvenience As to the place that is now Planted and the Inhabitants there is noe Inconvenience all but however here is their great Argument all this while You have no Lawfull Authority but they are to make good their owne power and not say we want it And their own Act hath put an end to all this for this very Act shows it was onely made for the province of New York and what is dependt on it. The title may be may afford no great Argument which says tis for his Matys Province of New York and its Dependancies But here is an Act to divide this Province and its Dependancys into Shires and Countys and here they are enumerated Now if they had found East Jersey amongst them they had said something but they cant think this a Dependt within the Generall words.

Then the Title and begining of the Act for Dividing New York into Provinces was Read.

*Sr. Bar. Shower.* Here is one County of Orang and it begins from the Bounds of East and West Jersey soe tis plaine they are excluded.

LD. CH. JUST HOLT. Gent. of the Jury this Accon is brought by these two plts against my Lord Bellamont Governor of New York. And it is for seizing a Shipp that was the plts Ship and severall Goods the Shipp was freighted withall. It is Gentlemen Admitted that this Shipp was seized but the question is whether or No this seizure was a Lawfull seizure and there hath been made a good Justificacon by my Lord Bellamont and those by him employed.

In the first place you are to Consider the value of the Shipp.<sup>1</sup> But that which my Lord Bellamont Insists upon is this Says he I was Governor of New York there was An Act of the Assembly made there in nature of an Act of our Parliament in England and by that they lay a tax or Duty upon all Shippes that shall be outward bound and come into any Port or Harbour of New York or its Dependencys and in case of refusall the shipp was subjected to a seizure and for that reason says he the plts shipp being outward

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<sup>1</sup> The Court then discussed the evidence on that point.

Laden at Perth Amboy and refusing to pay the Duty imposed by this Act this shipp was seized.

That there was such an Act and A Duty imposed and the plts Did refuse to pay it is without all question And for this reason the Shipp was seized but the matters insisted on on behalfe of the plts is this Say they tho' this is a very good Law and does bind New York and all the Country and Rivers that depend upon it yet it does not oblige any of the Inhabitants or any persons that Resort to New Jersey for that is noe Dependent on New York. To prove this they have showd you in the first place that this is the north part of America in about 41 Degrees Latitude 'tis a large tract of Land that did extend to the North part of America and was granted 16 March 1663 to the Duke of York and then was granted to him his heires and Assignes the Government of this whole Tract and Territory. This it seemes since has been improved and divided into four severall parts that is to say New York East Jersey West Jersey and New Albany but say they there was a Grant made by the Duke of East Jersey and West Jersey to my Lord Berkeley and Sr George Carteret and their heires and a Patent was produced in 1674 reciting the former Letters Patent and the Conveyances by the Duke and say they is now severed from New York and tho' New York become to the Crowne yet say they ever since this Grant hath New Jersey been lookt upon as a Distinct Province and hath had a separte Government and New York has never intermeddled with them but they have had Assemblys of their owne from tyme to time and having these Assemblys New York never intermeddled with them and they had Assemblys as one swore first that is to say in 1675 And New York had none till after Col Dungan came and he set up Assemblys at New York and say they no precedent can be produced before this Act of the Assembly of New York in 92 when the Government of New York have taken upon them to make Laws or exercise the Government in East Jersey and say they there was an Order of Councill in 83 whereby tis directed that these people at New Jersey should submit to those that were the Proprietors and such as they should appoint This was an order by the King countersigned by my Lord Sunderland and they say there was never any attempt upon them but once in the time of Sr Edmd Andros And he about the yeare 79 called Carteret who was Governor under the Proprietors to an Account and he deprived him of his Government and took the Government upon himselfe and did call Assemblys.

That he did look upon himselfe to have A Right soe to doe and was told he would be called to an Account if he did not call Carteret to an account for some misdemeanor whereof he was then accused and accordingly he did soe but when he called an Assembly then it seemes hee called it for New Jersey onely. Soe that say they this New Jersey has been always Lookt upon as Distinct from New York and not under ye Jurisdiçon or Government of New York and tho' Sr. Edmd Andros after that was called for home upon some other account yet that matter was settled as to Carteret and he was restored to his Governmt againe.

Well but notwithstanding all this says the Deft. this New Jersey is a Dependt on New York. how? Why thus when the Government of the whole Tract of Land was granted to the Duke in 74 tho' he does not Grant this New Jersey and West Jersey yet he cant splitt the Government that was at that tyme for he was but a subject And that would be Inconvenient for it would weaken the place and the Government would not be strong enough to defend itselfe and it may be It might be an Inconvenience when the King Grants a Tract of Land that the Proprietors should divide the Government but whether it can be soe or noe is not necessary at this time to Determine it hath been practised and let it remaine at present as it does but suppose it could not be why then say the Defts. Councill the whole Government remains in the Duke and now that Right is emerged in the Crowne and the Government is in the King of England and then he having made a Governor of New York the consequence will be that he is Governor of this whole Tract of Land but I take it to be otherwise and doe not think because the King hath made him Governor of New York that it appears that the Kings intençon was that the Governor of New York should be Governor of New Albany or East or West Jersey I do think that if the King who may divide and Canton it out as he pleases if he Grant the Government of New York to one by vertue of that Grant he doth not Carry the Government of New Jersey nor Albany.

Then they go to another thing and say that New Jersey is Dependent upon New York but I dont pçeive they have given any Evidence of that the King might have made it soe he might have said who ever is Governor of New York shall be Governor of New Jersey this might have been soe but it does not appeare that any such thing was mençoned and therefore if he was never made soe he that is Governor of New York is soe onely and of noe other part

and then he hath no Power or Authority to make Laws for any other parts tis true the Law intended to bind New Jersey but if he had noe Authority to call such an Assembly tis a void Law and the persons that have acted under that Law must be Trespassers.

You have heard the Evidence a great deale more largely than is necessary for me to repeat to you it seemes tho' they pretend New Jersey is Dependant on New York the Government there has not been exercised as such the usage hath been otherwise and it hath been otherwise and it hath beene looked upon otherwise — And soe it hath beene lookt upon *and tho' it had noe legall rise* yet it was reputed among themselves A Government Distinct from New York I leave it to you upon the whole matter. If you are satisfyed that East Jersey is a Dependt upon New York then you are to find for the Deft. But if it be not dependent on New York then you ought to find for the plt.

*(The jury found for the plaintiffs.)*